Hovsepian v. Apple, Inc. Doc. 313

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re ACACIA MEDIA TECHNOLOGIES CORPORATION,	Case No.05 CV 01114 JW **PLAINTIFF ACACIA MEDIA TECHNOLOGIES CORPORATION'S MOTION FOR IMMEDIATE ADMINISTRATIVE LEAVE TO VACATE THE OPPOSITION AND REPLY DATES RE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON SECTION 112 ISSUES PENDING THE OCTOBER 29, 2008 OSC HEARING** **(CIVIL L.R. 7-11)** DATE: N/A TIME: N/A CTRM: Ctrm 8, 4th Floor JUDGE: Hon. James Ware

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I. INTRODUCTION

In its October 9, 2008 Order to Show Cause Regarding Summary Judgment (Doc. No. 312) (the "OSC"), the Court set a hearing for October 29, 2008, at which time the parties must show cause "why summary judgment should not be entered in favor of defendants on the grounds asserted by plaintiff that none of the patent claims-in-suit are infringed; each of the patent claims-in-suit are invalid; and the patent claims-in-suit are unenforceable." (OSC, at 4:12-15). However, as things currently stand, plaintiff Acacia Media Technologies Corporation ("Acacia") is required to complete and to file its oppositions to defendants' separate, voluminous motions for summary judgment (the "Motions") on October 26, 2008. Thereafter, defendants have until January 9, 2009, to file their replies. In the event that the Court enters a summary judgment on October 29th on plaintiff's motion, defendants' Motions will be mooted and the time and money required to complete and to file the opposition to defendants' motions will have been completely wasted.

In view of the OSC, Acacia seeks an order immediately vacating the October 24, 2008 date by which Acacia must file it opposition to defendants' Motions and vacating the January 9, 2009 date by which defendants must file their replies, subject to these dates being re-set in the event that the Court does not grant summary judgment or issue a final judgment following the October 29, 2008 OSC hearing. The present motion to vacate merely sequences this case in a way that makes sense given the OSC. We respectfully ask that the Court rule on this request by the end of this week in order that Acacia's attorneys and experts can stop working on the Motions that may be mooted at the OSC.

No prejudice whatsoever will result to any party if this motion is granted. Any delay associated with the instant motion will be a matter of weeks and will not prejudice defendants because they will also be granted additional time to file their replies. Re-setting the opposition and reply dates would have no effect on any hearing date for the Motions, as the Court has not yet set a hearing date on the Motions.

II. BACKGROUND FACTS

Pursuant to the Court's May 27, 2008 Order (Doc. No. 282) (the "Scheduling Order"), defendants were permitted to file dispositive motions on "the disputed issues identified in the

Defendants' letters" by July 11, 2008 (Scheduling Order, at 1:21-23). Following Acacia's agreement to withdraw a number of claims, there were 17 disputed issues in defendants' letters – one of which claimed that every component of the "transmission system," as construed by the Court, lacked written description and enablement (there are nine components identified in defendants' letter) and another of which claimed that every component of the "receiving system," as construed by the Court, also lacked written description and enablement (there are seven components identified in defendants' letter). Defendants were permitted therefore to file additional dispositive motions, beyond those already ruled on by this Court that invalidated every asserted claim, which new motions address two validity issues (written description and enablement) for every component described in the specification (16 components) and which address another 15 issues for a total of more than 31 issues.[1] The Court did not set a hearing on defendants' Motions, choosing instead to review the motions and "set as many hearings as necessary to adjudicate Defendants' motions." (Scheduling Order, at 3:2-3).

Defendants Motions are collectively 83 pages long even though they do not separately address the written description or enablement requirements for any issue; i.e., both written description and enablement are simultaneously addressed. Since the written description and enablement issues are separate, factually intensive issues to be decided under separate legal standards, Acacia's opposition will and must separately address these different issues. Accordingly, Acacia's opposition will need to be substantially more detailed than defendants' Motions. Presently, Acacia's draft of its opposition (which addresses all issues set forth in defendants' Motions) is over 140 pages long. (Block Decl., ¶ 4).

Further, defendants did not submit any expert testimony addressing any of the relevant, underlying fact issues implicated in these Motions, such as the knowledge of one of ordinary skill in the art in January 1991, when the Yurt patents were filed. (Block Decl., ¶ 5). Acacia, however, is

[1] Defendants' Motions actually included two additional issues not identified in defendants' letters, and therefore defendants' Motions actually addressed 33 separate issues. Defendants' Motions include the issues of whether claim 46 of the '992 patent is invalid for failing to require that the user request identify a receiving system and whether claim 46 of the '992 patent is indefinite. Defendants' letters only identified the issue of whether claim 46 lacked written description.

working with its expert to prepare a detailed expert declaration addressing the knowledge of one of ordinary skill in the art, what one of ordinary skill in the art would understand from the specification for every component described therein, and whether any claim element would require undue experimentation to build or to use. (*Id.*)

Acacia's opposition and expert declarations are not yet complete, and, to meet the existing October 24, 2008 filing deadline, Acacia will still need to expend a significant amount of money. (Block Decl., ¶ 6). At least two of Acacia's attorneys will need to work full time on the opposition, and Acacia's expert, who has already spent over two weeks in Los Angeles working on this engagement, will need to be in Los Angeles for another week to conclude this work. (Block Decl., ¶ 6).

On October 9, 2008, the Court issued its OSC, setting a hearing for October 29, 2008 and ordering the parties to show cause "why summary judgment should not be entered in favor of defendants as requested by plaintiff on grounds that none of the patent claims-in-suit are infringed, each of the patent claims-in-suit are invalid, and the patent claims-in-suit are unenforceable." (OSC, at 4:12-15). The Court states in its OSC that it regards Acacia's motion for summary judgment as seeking adjudication on all liability issues in the case, and therefore, if summary judgment is granted, entry of a final judgment should occur. (OSC, at 3:17-21).

On October 10, 2008, Acacia requested that defendants agree to the relief sought here. (Block Decl., Exhibit 1). On October 14, defendants communicated to Acacia that they would not agree to this relief, thereby forcing Acacia to bring this motion. (Block Decl., Exhibit 2).

III. THE COURT SHOULD VACATE DATES FOR FILING THE OPPOSITION AND REPLIES TO THE MOTIONS, SUBJECT TO SUCH DATES BEING RE-SET SHOULD THE COURT NOT GRANT SUMMARY JUDGMENT AT THE OSC

In view of this Court's Order to Show Cause, there is no good reason why Acacia should be required to continue to prepare and to file an opposition to defendants' Motions on October 24. The dates now set for filing the opposition and replies to Defendants superfluous summary judgment Motions should be vacated. If the Court grants summary judgment as described in the OSC, the Motions will never be heard and will be moot. If the Court were not to grant the requested relief and require Acacia to file its opposition to defendants' Motion by October 24, 2008, Acacia will be required to expend substantial time and resources beyond that which has already been expended responding to defendants' voluminous and complex motions which may be mooted. On the other hand, granting this motion will not prejudice defendants in the unlikely event summary judgment does not enter on October 29. Any delay associated with this motion will be a matter of weeks, and the date upon which defendants replies will be due will be extended as well. There is no hearing date set for determination of the Motions so that will not be affected at all. Granting this motion to vacate merely serves to properly sequence the events of this case considering entry of the OSC by this Court.

IV. CONCLUSION

For the foregoing reasons, the Court should vacate the opposition and reply dates on defendants' Motions, subject to those dates being re-set, if necessary following the OSC hearing. We respectfully request that the Court rule on this motion on or before Friday, October 17 so that movant can either maximize its savings or know to continue to prepare its filings during the week preceding the now scheduled filing date for opposition to the Motions.

DATED: October 14, 2008

Respectfully submitted,

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PROOF OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 865 South Figueroa Street, Suite 2900, Los Angeles, California 90017.

On October 14, 2008, I served a copy of the within document described as **PLAINTIFF ACACIA MEDIA TECHNOLOGIES CORPORATION'S MOTION FOR IMMEDIATE ADMINISTRATIVE LEAVE TO VACATE THE OPPOSITION AND REPLY DATES RE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON SECTION 112 ISSUES PENDING THE OCTOBER 29, 2008 OSC HEARING** on the interested parties in this action by transmitting via the Electronic Case Filing Program of the United States District Court for the Northern District of California, the document listed above by uploading the electronic file for the above listed document on this date. The ECF Program will send an e-notice of the electronic filing to the parties listed on the attached Service List.

I also placed the document listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for Delivery as follows:

Chambers of the Hon. James Ware
Attn: Regarding Acacia Litigation
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3 copies

Executed on October 14, 2008 at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/S/ Lisa McCorry
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